TIP OF THE MONTH – MAY 2014

If you represent a client who you believe may end up as a creditor in a future bankruptcy proceeding involving an opposing party in your present case, remember when drafting the judgment that labels will not necessarily save the day in the bankruptcy context. What I mean by this is that it is not sufficient to get an agreement in writing that the debt will not be dischargeable in bankruptcy. Just because the judgment says the debt is non-dischargeable, it doesn't mean that the conduct in question is in line with the bankruptcy definition of a non-dischargeable debt.

To best serve your client and protect them against a future action in bankruptcy, and also to bypass a trial in bankruptcy court, you will need to establish the operative facts, by stipulation or in judicial findings of fact. For instance, in a state court setting, if you are alleging non-dischargeable fraud, you'll need facts adding up to the following:

1. *the debtor made a representation;*
2. *the debtor knew at the time the representation was false;*
3. *the debtor made the representation with the intention and purpose of deceiving the creditor;*
4. *the creditor relied on the representation; and*
5. *the creditor sustained damage as the proximate result of the representation.*

You'll want to make sure the settlement agreement has the defendant admit that (s)he made a representation to induce the behavior; that (s)he knew at the time it was false, etc. Then you have undisputed facts entitling you to summary judgment in your non-dischargeability action. You may well be saving your client future litigation in the bankruptcy court by establishing these facts and the non-dischargeability of the debt up front.

Megan L. Johnson
ISB Commercial Law and Bankruptcy Section Newsletter Chairperson
megan@sandpointlaw.com